

No. 13-1998 PO

We held a hearing on April 10, 2014. Assistant Attorney General Curtis Schube represented the Director. Neither Smith nor anyone representing him appeared. Our court reporter filed the transcript on the date of the hearing; therefore, the case became ready for our decision on April 10, 2014.

Findings of Fact

1. Smith holds a peace officer license issued by the Director that has been current and active since September 18, 2008.
2. On October 4, 2011, Smith committed the Class C felony of stealing in violation of § 570.030, RSMo Cum. Supp. 2010, when he appropriated a mobile radio with a value of at least \$500 from the Knox County, Missouri, Sheriff's Department without the permission of the Department and with the purpose to deprive the Department of the property.
3. On October 9, 2011, Smith committed the Class C felony of receiving stolen property in violation of § 570.080, RSMo Cum. Supp. 2010, when he disposed of the mobile radio owned by the Knox County Sheriff's Department, knowing that it had been stolen and with the purpose to deprive the Department of the property.
4. On October 30, 2011, Smith committed the Class D felony of resisting arrest in violation of § 575.150, RSMo 2000, when he fled from law enforcement officers who were arresting him for stealing and receiving stolen property.
5. On June 6, 2013, Smith pled guilty to the above three offenses in the circuit court of Knox County, Missouri. He received a suspended imposition of sentence and five years' probation.

Conclusions of Law

We have jurisdiction over this case. § 590.080.2, RSMo Cum. Supp. 2013. The Director has the burden of proving that Smith has committed an act for which the law allows discipline. *See Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

In his complaint, the Director alleges that there is cause for discipline under § 590.080:

1. The director shall have cause to discipline any peace officer licensee who:

* * *

(2) Has committed any criminal offense, whether or not a criminal charge has been filed;

(3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

Section 590.080.1(2)

The certified court records establish that Smith pled guilty to three felonies. Although a guilty plea resulting in a suspended imposition of sentence does not collaterally estop Smith from presenting evidence to the contrary, it is competent and substantial evidence that he did commit the criminal offense. *Director of Public Safety v. Bishop*, 297 S.W.3d 96, 99 (Mo. App. W.D. 2009). As Smith presented no evidence to disprove the fact, we conclude that he committed the crimes of stealing, receiving stolen property, and resisting arrest. He is subject to discipline under § 590.080.1(2).

Section 590.080.1(3)

As defined by a court when construing the term “under color of law” in the context of 42 U.S.C. § 1983:

“The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” . . . At the same time, however, the Supreme Court has made clear that even the “[m]isuse of power” possessed by virtue of state law is action taken “under color of state law.” . . . Thus, “under ‘color’ of law” means “under ‘pretense’ of law,” and “[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority *or overstep it*.”

Dossett v. First State Bank, 399 F.3d 940, 949 (8th Cir. 2005).

The Director presented no evidence or argument that Smith was on active duty when he committed the above criminal acts, or that he committed them under color of law. Therefore, we do not find Smith subject to discipline under § 590.080.1(3).

Summary

There is cause to discipline Smith's license under § 590.080.1(2).

SO ORDERED on April 24, 2014.

/s/ Karen A. Winn

KAREN A. WINN

Commissioner